OPINION OF ADVOCATE GENERAL LENZ

delivered on 20 April 1993 *

Mr President,
Members of the Court,

A — Introduction

1. By the present action the Kingdom of the Netherlands challenges a Commission Decision on the clearance of the EAGGF accounts for the 1988 financial year.

2. In that decision the Commission withheld a sum of HFL 708 540 from the amount granted to the Netherlands by the Guarantee Fund. This represented the difference between the amount which the Netherlands had collected and paid in the cereals marketing year 1987/88 as the co-responsibility levy in the cereals sector in accordance with Article 4 of Regulation (EEC) No 2727/75 [1] as amended by Regulation (EEC) No 1579/86 [2] and the amount which in the Commission's view should have been collected and paid. The difference related to a missing quantity of 49 000 tonnes of cereals subjected to the levy.

3. The dispute between the parties turns on the method on the basis of which the Commission made the deduction and which is closely associated with the special nature of the co-responsibility levy within the framework of the instruments which regulate the markets under the common agricultural policy. The levy was introduced because the Community legislature had considered it necessary, in view of the unequal trends in production and consumption of cereals, to 'give the producers an indication of the market situation'. [3] This indication might also, in theory, have taken the form of a reduction in the intervention price. However, the Community legislature also intended producers to take part in the financing of costs in the cereals sector. [4] It therefore introduced, as 'one of the intervention measures designed to stabilize agricultural markets', a levy to be collected by the national agencies and paid to the EAGGF. Pursuant to Article 4(4) of Regulation No 2727/75, as amended by Regulation No 1579/86 in conjunction with Article 1(1) of Regulation (EEC) No 2040/86, [5] in the year at issue the levy was payable on cereals where they entered into first-stage processing, were taken over by intervention agencies or were exported as grain to Portugal or non-member countries; eventually, however, the levy was to be passed on to the producer

* Original language: German.

1 — Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals (OJ 1975 L 281, p. 1).

2 — OJ 1986 L 139, p. 29.

3 — First and second recitals in the preamble to Regulation No 1579/86.

4 — Article 4(4) of Regulation No 2727/75 as amended by Regulation No 1579/86.

5 — Commission Regulation (EEC) No 2040/86 of 30 June 1986 laying down detailed rules for the application of the co-responsibility levy in the cereals sector (OJ 1986 L 173, p. 65).

(Article 4(6) of Regulation No 2727/75, as amended by Regulation No 1579/86).

4. Certain quantities of cereals were exempted from the levy, in particular where first-stage processing was carried out by the farmer on his own agricultural holding and the products of the processing were used as animal feed on the holding. [6] Moreover, pursuant to Regulation (EEC) No 2529/87 [7] France and Italy were authorized to collect the co-responsibility levy from producers on the quantities of cereals put on the market.

5. The essential features of the method used by the Commission to calculate missing quantities are already known to the Court as a result of Cases C-385/89 [8] and C-56/91: [9] [10] on the basis of statistical data which the Netherlands had provided to the Community statistics office (EUROSTAT), FEFAC (European Feed Manufacturers' Association) statistics and certain other data from the national authorities, the Commission calculated the amounts of cereals in respect of which the co-responsibility levy should have been collected and paid. It then deducted the amounts in respect of which the Netherlands had actually collected and paid the levy.

6. The applicant considers that the procedure followed by the Commission is unlawful. First, it is contrary to the rules on the clearance of the accounts and constitutes a misuse of powers by the Commission. Secondly, it is contrary to the principle of diligence or another general principle underlying the Community legal order.

7. The applicant claims that the Court should:

— declare that Decision C(90)2337 of the Commission of the European Communities of 30 November 1990 [11] is void in so far as, in the context of the accounts submitted by the Netherlands for 1988, it refuses to charge to the EAGGF the amount of HFL 708 540 on the ground of an alleged mistake in the amount collected and paid by way of the co-responsibility levy in the cereals sector;

— order the defendant to pay the costs.

8. The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

6 — See, in particular, the second subparagraph of Article 1(2) of Regulation No 2040/86 as amended by Regulation No 2572/86 (OJ 1986 L 229, p. 25).

7 — Commission Regulation (EEC) No 2529/87 of 21 August 1987 laying down detailed rules for applying the co-responsibility levy in the cereals sector for 1987/88 (OJ 1987 L 240, p. 13).

8 — Case C-385/89 *Greece* v *Commission* [1992] ECR I-3225; see, in particular, paragraphs 9 to 15.

9 — Judgment has not yet been delivered in this case; cf. Opinion of Advocate General Jacobs of 15 December 1992, in particular points 25 to 29.

10 — The method adopted by the Commission was not criticized in these cases.

11 — Published as Commission Decision 90/664/EEC (OJ 1990 L 359, p. 82).

9. France and the United Kingdom have intervened in the case in support of the Netherlands.

B — Analysis

10. I. Before going into the details of this case, I shall briefly describe the substance of each of the complaints raised by the applicant.

11. 1. By its first complaint, the applicant alleges a *breach of the rules on the clearance of the accounts* in two respects, one *substantive* and the other *formal*.

12. (a) As regards the *substantive aspect*, [12] the applicant considers that it complied in full with the obligations which, according to Regulation (EEC) No 729/70, [13] must be satisfied if credits designed to stabilize the agricultural markets are to be made available. They include the obligation to make the relevant payments in accordance with Community rules and national legislation (Article 4(2) of Regulation No 729/70). Moreover, the Member States are also required to take the measures necessary to satisfy themselves that transactions financed by the EAGGF are actually carried out and are executed correctly, to prevent and deal with irregularities and to recover sums lost as a result of irregularities or negligence (Article 8(1) of Regulation No 729/70). Lastly, the Member States are required, under the abovementioned provisions, to establish an administrative and supervisory system that will sufficiently guarantee that the co-responsibility levy payable is correctly applied, collected and paid.

13. The Netherlands claims that it set up an administrative and supervisory system which satisfies those requirements and, furthermore, that it ensured in certain individual cases that the levy was effectively collected. Moreover, the Commission has never established any failings in any of those respects. According to its summary report, [14] the Commission deduced from the statistical data which it used a 'presumption of inadequacy in the method of collecting the levy', which is neither verified nor substantiated. However, it was entitled to correct the accounts only if it established in individual cases that the levy had, wrongly, not been paid. That the Commission had not done.

14. In its reply the applicant, like the United Kingdom, placed particular emphasis on the administrative and supervisory system. The parties unanimously take the view that such a system is especially significant in the regulation of the market by revenue (levies), since the books reveal only the levies which have been paid and not those which have been evaded. In that regard the applicant maintains that the Commission should, if necessary, have checked whether there were any defects in the control system in the Netherlands. Without any finding of a defect in the system, the Commission was not entitled to correct the accounts, as otherwise the risk of a possible evasion of the levy would have been wrongly attributed to the Member

12 - See on this point paragraphs 17 to 20 of the application.

13 - Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1979 (I), p 218).

14 - Report of 30 June 1990, Document VI/220/90, and Addendum 1 of 31 July 1990

State. In that regard the applicant refers to Article 8(2) of Regulation No 729/70.

15. The formal aspect of this complaint [15] concerns the documents and findings on which the Commission can base the clearance of the accounts under Regulations No 729/70 and No 1723/72. [16] The applicant is of the opinion that for the purpose of the clearance of the accounts the Commission can rely only on the documents provided for in those regulations and the results of inspections on the spot. Statistics, as such, are not a valid basis.

16. 2. The *second* complaint, [17] that there has been a breach of the principle of diligence, is based on the contention that the statistical data are imprecise. The applicant comments on some of the individual statistics employed and concludes that the method used, because of the associated uncertainties, infringes the abovementioned principle or another principle of Community law. In this submission the applicant is supported in particular by the French Government.

17. II. As regards this criticism, let me state at the outset that the first aspect of the first complaint, much more than the remaining submissions in the application, concerns the principles which govern the clearance of the EAGGF accounts. The applicant is thereby asserting that it acted *lawfully* and that the Commission could not therefore hold it responsible for any discrepancies that might be established. This argument thus raises the question of how the risks are to be apportioned between the Member States on the one hand and the Fund on the other hand where the co-responsibility levy has not been collected in full. In my analysis of that problem I shall first of all make some general observations, [18] which will then be applied to the present case. [19]

18. 1 (a) First of all, it should be recalled that according to Article 4(4) of Regulation No 2727/75, as amended by Regulation No 1579/86, the co-responsibility levy is to be regarded as part of the 'intervention measures designed to stabilize agricultural markets'. Article 1(2)(b) of Regulation No 729/70 provides that intervention designed to stabilize the agricultural markets is to be financed by the Guarantee Section of the EAGGF. As in the case of other intervention of this type — and in principle this point is not disputed — in the absence of provisions to the contrary the co-responsibility levy is subject to the provisions of Regulation No 729/70. It is those provisions that determine how risks are to be apportioned between the Fund and the Member State where that question falls to be determined in the event of doubts concerning the lawfulness of the implementation of the law on the organization of the markets. Rules have been laid down on the principle of financing (Articles 3 and 4), on supplementary obligations of the Member States (Article 8) and on the supervisory role of the Commission (Article

15 — See on this point paragraphs 21 to 33 of the application.

16 — Regulation (EEC) No 1723/72 of the Commission of 26 July 1972 on making up accounts for the European Agricultural Guidance and Guarantee Fund, Guarantee Section (OJ, English Special Edition, Second Series III, p. 109).

17 — Paragraphs 34 to 42 of the application.

18 — See below, point 18 et seq.

19 — See below, point 49 et seq.

9). The Commission has no discretionary power to derogate from these rules. [20]

19. It is apparent from the present case, however, that examination of the wording of the rules in question shows that they are applicable only with difficulty to intervention which takes the form of levies collected from traders. The rules are much more obviously designed for the case of intervention in the form of payments to those traders. Thus Article 1(2) and Article 3(1) state that intervention is to be 'financed' by the Fund, while Article 4(2) speaks of making the necessary credits available so that the competent bodies of the Member State may make the payments 'in accordance with Community rules'. Article 8 concerns, *inter alia*, the 'recovery' of sums lost.

20. For that reason the relevant provisions must be understood, for the purpose of the present context, as meaning that possible 'financing' by the Fund means that the Fund cannot demand from the Member State in question an amount greater than the amounts of levy collected by the State. That, incidentally, is also consistent with the objective of the levy, which is supposed not only to contribute towards the financing of expenditure in the cereals sector but also to exert pressure in order to curb production.

21. From that aspect, in the event of differences of opinion between the Fund and a Member State it must be established, with the assistance of Regulation No 729/70, whether there is sufficient ground for charging to a Member State amounts which it has not yet received from the persons liable to pay the levy under the relevant provisions and which it perhaps never will receive.

22. In that regard, it follows generally from the scheme of Regulation No 729/70 that financing by the Fund will be refused if — but only if — the Member State has infringed the relevant provisions of Community law. [21] That principle first appears in Article 3(1), which provides that '[i]ntervention intended to stabilize the agricultural markets, undertaken according to Community rules', [22] is to be financed by the Fund. Similarly, Article 4(2) provides that:

'The Commission shall make available to Member States the necessary credits so that the designated authorities and bodies may, *in accordance with Community rules* [23] and national legislation, make the payments [24] referred to in paragraph 1'.

23. Article 8(2) applies this concept to the case where amounts lost owing to irregularities or negligence are not recovered in full. In that case

20 — Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 28.

21 — Case 11/76 *Netherlands* v *Commission* [1979] ECR 245, paragraph 8; Case 347/85 *United Kingdom* v *Commission* [1988] ECR 1749.

22 — Emphasis added.

23 — Emphasis added.

24 — That is the payments of 'the expenditure referred to in Articles 2 and 3'.

'the financial consequences of irregularities or negligence shall be borne by the Community, with the exception of the consequences of irregularities or negligence attributable to administrative or other bodies of the Member States'.

24. The logical complement to those requirements is provided in Article 9, which authorizes the Commission to undertake the supervisory measures which it may consider necessary. It follows from Article 9(2)(a) that the Commission is to check, *inter alia*, 'whether administrative practices [of the Member State in question] are in accordance with Community rules'.

25. In the present case the Commission took the view that Article 9 did not restrict the possible methods of supervision and that, accordingly, such supervision could also be carried out using statistical data. [25] At the present stage, it is sufficient to point out that the broad wording of Article 9(1) with regard to supervisory methods cannot alter the fact that attribution of the burden of missing amounts depends on the lawfulness of the action of the Member States and not on the lawfulness of the Commission's supervision.

26. (b) For the application of the criterion thus defined (the lawfulness of the action of the Member State concerned) two different obligations are relevant.

27. First, the Member State must comply with the formal and substantive provisions of the regulation of the markets: that is made quite clear in Article 3(1) of Regulation No 729/70. Secondly, the Member State is subject to the additional obligations laid down in Article 8(1): it must

'— satisfy [itself] that transactions financed by the Fund are actually carried out and are executed correctly;

— prevent and deal with irregularities;

— recover sums lost as a result of irregularities or negligence.'

28. That provision was complemented in so far as the co-responsibility levy is concerned by Article 7(1) of Regulation No 2040/86, which, as amended by Regulation No 2572/86, provides as follows:

'Member States shall take any additional measures required to ensure that the co-responsibility levy is collected in accordance with this Regulation, and in particular measures concerning controls. To that end Member States may draw up a list giving the names of the operators referred to in Article 2(1). [26] Member States may also ask operators to provide additional information to that given in the declaration specified in Article 2(1).'

29. For the purposes of this control, the operators concerned are required, pursuant to Article 6 of Regulation No 2040/86, to

25 — Emphasis added.

26 — Article 2(1) defines the operators required to pay the levies and provides that on each payment those operators are to forward a declaration in writing containing certain information to the competent authority.

keep accounts concerning certain data which the national authorities can examine.

30. (c) Since the rules on the organization of the markets, in particular in the sphere of controls, do not always determine the obligations of the Member States expressly and in every detail, the question arises how it is to be established in such cases, for purposes of financing, whether or not the Member State has complied with Community law. That question may be important in the present case with regard to Article 8(1) of Regulation No 729/70 and Article 7(1) of Regulation No 2040/86.

31. Two principles apply here, serving to strike a reasonable balance between the interests of the Member States and those of the Fund.

32. First of all, there is the duty of the Community authorities and the national authorities to cooperate in good faith as laid down in Article 5 of the Treaty. For the national authorities it entails that they are to ensure that the aim pursued by the Community rules is achieved. [27] Accordingly, where a Member State has omitted to take certain control measures which follow by implication but in a sufficiently clear manner from the applicable provisions and their objectives, it cannot avoid the financial consequences of its omission by pleading the absence of express requirements. [28]

33. Secondly, that principle is limited and complemented by the requirement of certainty and predictability which must be satisfied in particular in the application of provisions which have financial consequences. [29] It has special relevance for the financial relations between the Commission and the Member States in the context of the clearance of the EAGGF accounts. [30] In Case C-10/88 (birth premiums for calves) [31] the Court inferred from that principle that even though the Commission can fix a precise period for the processing of applications which takes into account the purpose of the rules and is not unreasonable, it can rely on this period as against the Member State in the context of the clearance of the accounts only where it informed the Member State of the period in due time.

34. The same must also be true in the sphere of controls, for example where the Commission wishes to require on-the-spot inspections to be carried out in a sufficiently precise percentage of cases in which the relevant rules are applied. [32]

35. (d) It also follows from the requirement of certainty and predictability that the Member State must be informed in sufficiently clear terms of the nature of its alleged infringement of the rules on the organization of the markets.

27 - Case 14/88 *Italy* v *Commission* [1989] ECR 3677, paragraph 20, Case C 10/88 *Italy* v *Commission* [1990] ECR I 1229 (summary publication: see paragraph 11 of the full judgment).

28 - Case C 8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraphs 20, 21 and 22; Joined Cases 258, 337 and 338/87 *Italy* v *Commission* [1989] ECR 3359, paragraphs 15 to 18.

29 - Case C-30/89 *Commission* v *France* [1990] ECR I 691, paragraph 23

30 - Case C 34/89 *Italy* v *Commission* [1990] ECR I 3603.

31 - See footnote 27.

32 - Opinion of Advocate General Van Gerven of 24 January 1990 in Case C 8/88 *Germany* v *Commission* [1990] ECR I 2334, points 20, 21 and 22

36. In a case concerning the recovery of amounts paid out in application of Article 8(2) of Regulation No 729/70, [33] the Court stated that the national authorities had 'not acted with the necessary diligence', since they had waited four to ten years before starting proceedings to recover amounts wrongly paid. [34]

37. The Court went on to state, with regard to the abovementioned requirement:

'If the Commission intends to attach financial consequences to inaction or omissions on the part of national authorities in implementing their Community obligations, such as those imposed by Article 8 of Regulation No 729/70, certainty and predictability in financial relations require that the Commission indicate clearly to those authorities what it is complaining of and not attach financial consequences to their failure until a reasonable period of time has elapsed.'

38. It follows that when the Commission requires Member States to adopt a certain course of action which follows by implication from the rules — and which has not first been made clear by the Commission — it must base its decision on a specific complaint. In the sphere of controls, the Court has held [35]

'that the Commission is obliged on each occasion to give reasons for its decision finding an absence of, or defects in, inspection procedures operated by the Member State in question.'

39. (e) Another factor of relevance for the application of the criterion of lawfulness, [36] is the apportionment of the burden of making out a case and furnishing proof. The applicable principles, regard being had to the special features of the co-responsibility levy as an intervention instrument, may be summarized as follows.

40. As regards proof of the observance or non-observance of Community law, the first step must without question be taken by the Commission. That is clear from the point made above that, for the purpose of a decision laying the burden of disadvantages resulting from irregularities on the Member State concerned, the Commission must inform the Member State of the complaint against it. [37] However, it would not be consistent with the principle of cooperation in good faith [38] and with the possibility of supervision provided for in Article 9 of Regulation No 729/70 if the Commission could refuse financing on the basis of allegations not supported by indications of substance. Such an onerous allegation against the

33 — Case C-34/89 *Italy* v *Commission* [1990] ECR I-3603.
34 — Paragraph 13.
35 — Case C-8/88 (cited in footnote 28), paragraph 23.
36 — See above, point 22 et seq.
37 — See above, points 35-38.
38 — See above, point 32.

Member State must, rather, be based on concrete findings giving rise to serious doubts as to compliance with Community law. [39]

41. Provided that those conditions are met, the burden of proof is entirely borne by the Member State. The Court has held that

'when the Commission refuses to charge certain expenditure to the EAGGF on the ground that it was incurred as a result of breaches of Community rules imputable to a Member State, it is for that State to show that the conditions for obtaining the financing refused by the Commission are fulfilled.' [40]

42. As regards the *causal link between the breach of the law by the Member State and possible financial disadvantages charged to the Fund*, the question of the burden of making out a case and furnishing proof arises whenever it is uncertain to what extent the action of the Member State which is incompatible with Community law has adversely affected the Fund. If the Member State's infringement of Community law is established and is liable to entail such a disadvantage, then in principle the burden of that uncertainty falls on the Member State: it must, if at all possible, [41] show and prove that its conduct has not produced a disadvantage to the Fund, or that it has done so to an extent less than that estimated by the Commission. [42] The Court has also applied this principle to a case in which the Commission refused to finance premiums granted in certain areas of a Member State because of the lack of adequate control mechanisms in those areas. [43]

43. The Court has therefore accepted that the relationship between the Member State and the Community and that between operators and the Member State are not absolutely parallel. More specifically, it did not find fault with the fact that lump sums were charged to a Member State, because it had, by infringing Community law, created or increased the risk that the Fund would be wrongly charged with amounts which could not be precisely calculated.

44. Common to all those cases, however, is the fact that there was verifiable evidence of the causal link between the conduct of the Member State which was contrary to the common organization of the markets and the amount charged. That amount corresponded, in particular, to a specific item in the accounts which could have increased precisely because of the Member State's breach.

39 — See Case C-8/88 (cited in footnote 28), paragraphs 23 and 28. The Court also applied this principle, implicitly at least, in Case C-281/89 *Italy* v *Commission* [1991] ECR I-347: see paragraphs 19 and 20 in conjunction with the reasoning of Advocate General Mischo in his Opinion of 22 November 1990, at p. 354, points 18 and 19. To my mind the statement in paragraph 19 of that judgment that the Commission must 'prove' an infringement of the rules on the common organization of the agricultural markets, is too far-reaching as a rule and is not supported by the case-law cited

40 — Case 347/85 *United Kingdom* v *Commission* [1988] ECR 1749, paragraph 14.

41 — For a case where such proof was not possible, see Joined Cases 15/76 and 16/76 (cited in footnote 20).

42 — Case 347/85 *United Kingdom* v *Commission* (cited in footnote 40), paragraphs 15 and 16 in conjunction with paragraphs 26, 29, 32 and 33; see also Case C-334/87 *Greece* v *Commission* [1990] ECR I 2875 (summary publication; see paragraph 13 of the full judgment).

43 — Case 8/88 (cited in footnote 28).

That was the position in Joined Cases 15/76 and 16/76 on aids for the distillation of wine granted by a Member State unilaterally and in addition to the Community aid which were liable to increase the volume of the quantities offered for distillation and thus the corresponding item of the EAGGF. [44] The position was quite similar with regard to the dual pricing system for certain milk products in Case 347/85, which led the Commission to refuse to charge to the EAGGF the 'items affected by the differential prices'. [45] In Case 8/88 the premiums for sheepmeat producers and for the maintenance of the suckler cow herd that were charged to the Member State were those in respect of which that Member State had failed to fulfil its supervisory duties in certain geographical areas and the total amount of which was possibly higher than if a proper inspection procedure had existed.

45. As regards the burden of making out a case and furnishing proof, the Court adopts the same approach as it does to the question whether the Member State has infringed the rules on the organization of the markets. Accordingly, it is for the Commission to take the first step and to present sufficient objective indications that the items of expenditure which it has disallowed might have been increased as a result of the Member State's conduct. Only then is the burden of proof regarding the financial consequences of the infringement transferred to the Member State. In Case 347/85 the Court held that:

'Since the Commission has thus established that in applying the differential prices in question the United Kingdom committed infringements of the rules of the common organization of agricultural markets *of such a nature as to affect certain EAGGF expenditure*, it should now be considered whether the United Kingdom has nevertheless shown that the financial consequences of those infringements were actually different from those calculated by the Commission.' [46]

46. As regards the co-responsibility levy, it must be stated that a relationship between shortcomings in the administration and monitoring of that levy and the amounts wrongly not collected can easily be established only where the operators concerned are known. That is so in particular where the shortcoming is no more than an incorrect application of the relevant substantive conditions of the levy. For the remainder, particularly in the case of inadequate supervision, it may not be easy to identify uncollected amounts which relate to certain areas, groups of producers or similar objective factors in respect of which the Member State's action is open to criticism.

47. In that regard the Commission stated in its rejoinder [47] that examination by the Commission of the national administrative and supervisory system does not reveal what specific amounts were not collected. However, it has not stated whether there are other possible ways of establishing such a connection between any shortcomings found in the

44 — See footnote 20.

45 — Cited in footnote 40, paragraph 4 of the judgment; in that case the Commission did not even claim the full amounts corresponding to that item, but endeavoured to apportion them fairly.

46 — Paragraph 33; emphasis added.

47 — Paragraph 19; also at the hearing: p. 24 et seq. of the transcript.

system and amounts which might objectively be connected with those shortcomings, even allowing for a certain margin of error.

48. Be that as it may, in the absence of a provision making the Member States liable for losses of revenue to the Fund in the context of the co-responsibility levy irrespective of the lawfulness of their action, the requirement of such a causal relationship cannot be ignored. Any difficulties confronting the Commission in this regard might have led the legislature to adopt measures to transfer to the Member States a greater part of the risk in the sphere of the co-responsibility levy. In the absence of such special provisions it is necessary — without prejudice to the authority conferred on the Commission by Article 169 of the EEC Treaty — to apply the principles which, for the clearance of the accounts, follow from Regulation No 729/70 in conjunction with Regulation No 2040/86.

49. 2. I shall now examine the present case in the light of those principles.

50. (a) The Commission, in holding the applicant accountable for the amount allegedly missing, relied during the accounts clearance procedure solely on the fact that a difference between the quantities resulting from the (essentially statistical) data which it employed and the quantities subjected to the co-responsibility levy by the Member State should be charged to the Member State. It is common ground that, for the marketing year in question, the Commission did not examine the Netherlands administrative and supervisory system. It relied instead on the abovementioned difference to establish a 'presumption of inadequacy in the collection procedure'. If the Member State does not adduce evidence of errors in the statistics, the Commission draws the financial consequences of the negligence thus established. [48] On this last point, it should be observed that the possibility given to the Netherlands to make corrections was limited to the statistical data used. The applicant's submission prior to these proceedings regarding the lawfulness of its administrative and supervisory system was rejected by the Commission as irrelevant. [49]

51. The Commission's argument can be endorsed only if

— the data used by the Commission for the purposes of comparison reliably reflect the amounts in respect of which the co-responsibility levy should have been paid,

and

— this finding raises serious doubts as to the lawfulness of the Netherlands administrative and supervisory system.

52. If both these conditions had been satisfied, the Commission would have fulfilled its burden of making out a case and furnishing

48 — Paragraph 4.2.2.2.3. of Addendum 1 to the summary report.

49 — See appendix 2 to the application and paragraph 23 of the reply.

proof with regard to both the Member State's infringement of Community law [50] and the causal link between that infringement and a reduction in the revenue of the Fund. [51]

53. (aa) I share the applicant's doubts regarding even the condition in the first indent. The figure relating to total domestic consumption, the starting-point for the Commission's calculation, [52] contains two essential factors which, it is established, are based on statistics not derived from administrative documents and which cannot be verified without unconscionable effort. They therefore inevitably show a margin of error. The data in question relate to the quantities of cereals used in the *manufacture of animal feed* and for *human consumption*. Perhaps some details should be provided of the first-mentioned amount, which occupies a prominent place in the Commission's submissions. In the Commission's own words, this item is made up of sub-item 'feed processing industry' (which accounts for by far the greatest part of the quantities used in the manufacture of animal feed and is subjected to the co-responsibility levy) and sub-item 'used as animal feed by the producer' (which is exempt from the levy). The Commission did not deny that the first-mentioned sub-item is based on information from FEFAC, which is taken partly from the — indisputably unreliable [53] — cereals balance sheets and partly from estimates provided by individual national associations. The item 'used as animal feed by the producer' cannot, as the Commission itself states, be determined by reliable statistics; it can only be roughly estimated, as the applicant maintains. [54] The Commission therefore expressed it as a balance between the overall item 'animal feed' and the sub-item 'feed processing industry'. The Commission explained at the hearing that the overall figure for 'animal feed' was derived from the information which the Netherlands had sent to EUROSTAT. On the other hand, it was not made clear how the Netherlands might have reliably determined that amount in respect of the part 'used as animal feed by the producer'. It is therefore by no means impossible — and it is just as likely as the contrary assumption — that the quantities used as feed by the producer are greater than assumed, as the Netherlands asserted before these proceedings, [55] reducing other quantities which are subject to the co-responsibility levy. Lastly, it emerged in the present proceedings that the foreign trade statistics for the Netherlands used by the Commission do not provide reliable information as to the year of import or export: those statistics are inaccurate as regards the dates of individual transactions, because delays occur in the registration of those transactions by the Netherlands authorities. The Commission itself concedes that that circumstance might explain the missing quantity in issue in whole or in part.

50 — See above, points 40 and 41.

51 — See above, points 42 to 48.

52 — Paragraph 9 of the defence.

53 — Paragraph 6 of the rejoinder.

54 — Paragraph 31 of the reply.

55 — 65 000 tonnes instead of 13 000 tonnes.

54. (bb) Even on the assumption that there is sufficient evidence that co-responsibility levy was wrongly not collected on 49 000 tonnes of cereal, that in itself does not raise serious doubts as to the lawfulness of the Netherlands administrative and supervisory system.

55. Contrary to what the Commission apparently believes, [56] the obligations under Article 8(1) of Regulation No 729/70 and Article 7(1) of Regulation No 2040/86 are not *obligations of result* but *obligations of diligence*. The Court has already expressly stated this with regard to Article 8(1). [57] If Article 7(1) of Regulation No 2040/86 were interpreted differently, that would mean denying that levies have been evaded as long as they have existed. In concrete terms, in order to preclude any evasion it would be necessary to have supervisory personnel permanently present in all the undertakings whose transactions might be of relevance to the co-responsibility levy, which would be quite disproportionate when measured against the purpose of the levy. Furthermore, where the Commission states that it intends to establish by means of its method the extent to which amounts payable under the co-responsibility levy were not paid as a result of irregularities, it is confusing the aspect of the lawfulness of the conduct of the operators with that of the lawfulness of the action of the Member States. The importance of that distinction has already been noted by Advocate General Capotorti in Case 11/76 in regard to Article 8 of Regulation No 729/70. [58]

56. Lastly, even though a missing quantity may give reason to doubt the lawfulness of the system, it remains quite unclear precisely how the Member State may have failed to fulfil its obligations. I would cite the following statement by the Court of Auditors when it examined the co-responsibility levy system — although not for the specific purpose of the clearance of the accounts:

'The clearance exercises for 1986 and 1987 included a reconciliation of quantities declared for levy against quantities leviable as shown by the available official statistics. While such global reconciliation is a valuable preliminary exercise in highlighting problem areas it is, in itself, not sufficient to detect the underlying reasons for discrepancies shown.' [59]

57. The Commission has expressly recognized the accuracy of that finding. [60] The reservation to which it gives rise is all the more justified in the present case because the allegedly missing quantity of 49 000 tonnes does not even amount to 1% of all the quantities which, according to the Commission's calculations, were subjected to the co-responsibility levy in the Netherlands in the marketing year in question (6 929 000 tonnes).

56 — See paragraph 30 of the defence and paragraph 19 of the rejoinder.

57 — Case C-34/89 *Italy* v *Commission* [1990] ECR I 3603, paragraph 12.

58 — Opinion of 5 December 1978 [1979] ECR 286, at p. 292, left hand column.

59 — Annual report concerning the financial year 1989 together with the institutions' replies, OJ 1990 C 313; the extract quoted is from paragraph 4.3.54, of the report, at p. 86.

60 — Second subparagraph of paragraph 20 of the defence.

58. (b) Although the figures produced by the Commission do not therefore prompt any serious doubts as to the lawfulness of the applicant's conduct, it is still necessary to deal briefly with the Commission's submission whereby — for the first time in the reply — it criticizes specific aspects of the actual administrative and supervisory system in the Netherlands. [61]

59. (aa) It should first of all be observed that, on grounds of principle, that submission is inadmissible. As stated above, [62] for reasons of the clarity and predictability of financial relations in the context of clearance of the accounts the Commission must clearly inform the Member State concerned of the complaints against it. As we have seen, the information received by the Member State in these proceedings does not satisfy the requirements as thus defined. Nor does it have any connection with the specific points which the Commission belatedly raised in the procedure before the Court. Since the impugned decision is not based on sufficient doubts as to the lawfulness of the conduct of the Member State and, as I have said, the criticism put forward in the procedure before the Court can no longer be taken into account, the application must be granted.

60. (bb) Nor would this outcome be different if, notwithstanding the abovementioned reservations, the Commission's submission were to be examined in detail.

61. That submission is based in essence on observations which the Court of Auditors made in the abovementioned report with regard to the administrative and supervisory system in the Netherlands and concerns three aspects.

62. As regards *on-the-spot visits*, the Commission refers on the one hand to the following passage in the report of the Court of Auditors:

'In the Netherlands, the responsible control service took more than a year to fix a programme of on-the-spot visits for the new levy scheme ...'. [63]

63. It follows from the report itself that, as the applicant submitted without being contradicted, [64] that criticism concerns the 1986/87 marketing year and not the 1987/88 marketing year with which the present case is concerned.

64. Furthermore, the Commission comments on the applicant's statement that the administrative and supervisory system satisfies the requirements, according to a report of the audit service of the Ministry of Agriculture. [65] On-the-spot inspections had been carried out in 90% of the undertakings registered under Article 7(1) of Regulation No 2040/86. [66] In the Commission's view that report is based only on an examination of the documents of the Hoofproduktschap voor Akkerbouwprodukten, the competent

61 — Paragraphs 29 and 30 of the defence.
62 — Points 35 to 38.
63 — Paragraph 4.3.23 of the report.
64 — Paragraph 49 of the reply.
65 — Annex 3 to the application.
66 — Paragraph 47 of the reply.

body for the co-responsibility levy, and therefore does not prove the lawfulness of the control system. In particular, there is no mention in the report of on-the-spot inspections.

65. To my mind the Commission has not discharged its burden of making out a case and furnishing proof in that regard. In particular, it has produced no evidence to justify any serious doubts as to the lawfulness of the conduct of the Netherlands administration. [67]

66. The Commission bases its second complaint on the following observation of the Court of Auditors:

'In some of the collecting firms visited, *difficulties were encountered in reconciling the quantities declared for levy with the firm's records* ...'. [68]

67. In that regard, it is necessary first of all to recall the reasons given by the Court of Auditors for those difficulties. The difficulties were

'due partly to non-standardization of records to be maintained but also [to the fact that], in one case, basic supporting documentation, i. e. laboratory analysis bulletins, had been destroyed prior to the visit'.

68. The latter circumstance is clearly not imputable to the applicant Member State. As for the former, lack of standardization of the records to be maintained, it should be pointed out that the Court of Auditors refers only to difficulties and does not say that the desired reconciliation of the documents was impossible. If the Commission had meant to oblige the Member States, for the purposes of the clearance of the accounts, to require operators not only to comply with Article 6 of Regulation No 2040/86 but also to standardize the documents necessary under that regulation, it should have made that clear beforehand. [69] In that regard, I also refer to the Court of Auditors' criticism of the extremely vague nature of the Community provisions on the administration and supervision of the co-responsibility levy. [70]

69. The final aspect mentioned by the Commission concerns the reconciliation with other documents *of the relevant information* for the co-responsibility levy provided by *small producers*, who, in accordance with Article 4(4) of Regulation No 2727/75 as amended by Regulation No 1900/87, [71] received aid in the form of compensation for the co-responsibility levy payable by those producers in the Netherlands during the 1987/88 marketing year. [72]

70. The Court of Auditors observed: [73]

'However in the Netherlands, where such checks could have been carried out in respect of small producers, they were not.'

67 — See above, points 40 and 41.

68 — Paragraph 4.3.23(b) of the report, emphasis added.

69 — See above, points 35 to 38.

70 — Paragraph 4.3.50(a) of the report.

71 — OJ 1987 L 182, p. 40

72 — Reply, paragraph 49.

73 — Last sentence of paragraph 4.3.14 of the report.

71. In that regard it is sufficient to state that the Commission did not dispute the applicant's submission that by, carrying out on-the-spot inspections, it ensured, that its supervision was as thorough as supervision in the form of reconciliation of the supporting documents; furthermore, the Commission has presented no evidence whatsoever of a connection between any defect in such supervision and the amount at issue in these proceedings. [74]

72. The ensuing conclusion that there was no lawful basis for the deduction effected by the Commission is not affected by the Commission's argument that the method it used is justified, in the absence of sufficient resources to review the administrative and supervisory systems of all the Member States, by the concern to treat all Member States equally. The principle of equal treatment cannot be relied on to support an illegal act. [75]

73. For all the above reasons I propose that the Court should:

— declare that the contested decision is void to the extent sought in the application;

— order the Commission to pay the costs in accordance with Article 69(2) of the Rules of Procedure, apart from the costs incurred by the interveners, who, pursuant to Article 69(4), must bear their own costs.

74 — Moreover, the quantity which gave rise to reimbursement to small producers is, on the basis of the Commission's own figure of 13 000 tonnes, considerably lower than the quantity of 49 000 tonnes at issue.

75 — Case C-313/90 *CIRFS* v *Commission* [1993] ECR I-1125, paragraph 45.